

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: September 20, 2001

BALCA Case No. 2001-INA-68

ETA Case No. P2000-PA-0334

In the Matter of:

CYBERTECH SYSTEMS, INC.

Employer,

on behalf of

PRAKASH CHAND PAHARIA

Alien

Appearance: Jeffrey A. Weisberg, Esq.
Farmington Hills, Michigan
For Employer

Certifying Officer: Richard E. Panati
Philadelphia, Pennsylvania

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Controller.¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

¹ Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On September 20, 1999, Employer, CyberTech Systems, Inc., filed an application for labor certification to enable the Alien, Prakash Chand Paharia, to fill the position of Controller. (AF 26). The requirements were (1) a Bachelor of Arts degree in Finance, Accounting, Business Administration, Financial Management or Financial Information Systems or its foreign educational equivalent; and (2) one year of experience in the job offered or one year as an accountant, senior accountant, company secretary or manager-exports engineering. The job duties were listed as follows:

Direct financial activities of systems integration and software development firm: prepare reports summarizing and forecasting company business activity and financial position in areas of income, expenses and earnings based on past, present and expected operations; direct determination of depreciation rates to apply to capital assets; and establish or recommend to management, major economic objectives and policies for company or subdivision.

Upon receipt of responses from U.S. applicants to the advertisement of the position, Employer forwarded a letter to each one, indicating as follows:

In order to evaluate your suitability for our position, please contact the undersigned for a possible interview and/or submit the following items:

1. A copy of your Master's degree in Finance, Accounting, Business Administration, Financial Management or Financial Systems or its foreign equivalent.
2. Verification that you have one year of experience in the job offered or one year related experience as Senior Accountant, Company Secretary or Manager-Exports Engineering.²

(AF 35). Applicants were advised that failure to provide the requested items within 21 days would result in Employer assuming the applicant was no longer interested in the position. Applicants were further advised that if hired, verification of United States citizenship or legal authorization to work permanently in the United States, would be required.

The CO issued a Notice of Findings ("NOF") on October 27, 2000, proposing to deny certification pursuant to 20 C.F.R. §656.21(b)(6) and 20 C.F.R. §656.20(c)(8). (AF 23).

²While the CO never raised the issue, it must be noted that Employer's letter seeks verification of a Master's Degree, a requirement which was never listed in its application, and which raises the issue of an unlawful unstated job requirement. This omission by the CO, however, does not alter the outcome of the case.

Specifically, the CO noted that nineteen U.S. applicants applied for the position, thirteen of whom were rejected, according to Employer's letter of April 7, 2000, because "[d]uring the course of the interview, the applicant stated s/he could not perform the job duties." (AF 36). The CO did not find this to be a credible statement, given that the majority of those applicants possessed the qualifications requested in the ETA 750. The CO also found Employer's request that the applicants produce documentation, as a condition precedent to an interview, to be unreasonable. Since the applicants' resumes indicated they were qualified, an interview should have been granted unconditionally.³ Employer was advised it needed to show that the U.S. workers were not able, willing, qualified or available for the job opportunity.

Employer's counsel submitted a rebuttal on January 5, 2001. (AF 9). Therein, it was argued that Employer rejected all nineteen applicants solely for the following lawful job related reasons: (1) the applicants were unsuitable for the job opportunity because they were unable to perform the stated job duties; or (2) the applicants were unresponsive/unavailable. Counsel for Employer contended that Employer's letter reported that it carefully considered each applicant's resume and response materials and concluded that the applicants were unqualified to perform the stated duties. "Nevertheless the employer conducted a telephone interview or attempted to conduct a telephone interview with each applicant." Thirteen applicants confirmed during their interviews that they were not suitable for the position. Two applicants declined to be interviewed and four applicants failed to respond to repeated efforts to interview them. Counsel for Employer argued that Employer had articulated an objective, specific basis for reaching the conclusion that each applicant was unsuitable for the position.

A Final Determination was issued on January 17, 2001. (AF 7). The CO did not accept Employer's rebuttal, reiterating the fact that its statements about the applicants' opinions regarding their respective qualifications could not be accepted. The CO found that Employer's rebuttal presented no clear evidence that the applicants were unqualified.

On February 28, 2001, Employer requested review of the denial of labor certification by the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). (AF 1).

DISCUSSION

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§656.1, 656.2(b). Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). Moreover, the employer must establish by convincing evidence that an applicant whose resume indicates he or she is qualified is not qualified

³While a second issue was raised in the NOF, given that the CO found it to have been successfully rebutted, it will not be discussed herein.

- the employer cannot shift the burden to the CO to show that the U.S. worker is qualified. *Fritz Garage*, 1988-INA-98 (Aug. 17, 1988)(*en banc*).

In the instant case, Employer contends that the applicants at issue were unsuitable for the job opportunity because they were unable to perform the stated job duties. In this respect, Employer cites numerous cases to support its argument that rejection of an applicant is lawful in cases where the applicants may possess all of the stated job qualifications but may not be able to perform the listed job duties. Employer contends that the job is a “highly specialized position, the job duties of which could not be performed efficiently without training or experience directing financial activities in the areas of system integration and software development.” Employer argues that it carefully considered each applicants' resume and response materials and concluded that each applicant was unqualified to perform the stated duties.

In its letter of April 7, 2000, wherein it justified its rejection of U.S. applicants, Employer claims that thirteen applicants advised Employer that they could not perform the job duties. According to Employer, six applicants stated they were unable to direct financial activities of systems integration and software development firm and direct determination of depreciation rates to apply to capital assets, while a seventh indicated his inability to perform those activities as well as that of establishing or recommending to management, major economic objectives and policies for the company or subdivision. (Loughery, Forbes, Criger, Bucci, Philip, Floyd, McCreesh). Two applicants stated they were unable to direct financial activities of a systems integration and software development firm. (Tustin, Carroll). One stated he was unable to prepare reports summarizing and forecasting company business activity and financial activity and financial position in areas of income, expenses and earnings based on past, present and expected operations. (Green). Three applicants stated they were unable to perform any of the job duties (Coates-Knowles, Savadove, Kaufman).

While the record does not contain any of the responses or resumes received from the U.S. applicants, given that Employer does not contest the fact that the resumes of the majority of the applicants noted above met its requirements as listed on the ETA 750, the only issue before the Board is whether the basis of Employer's rejection of these applicants is lawful.

An employer's stated reason for rejection is insufficient to establish a lawful ground for rejection of a U.S. applicant where it is a mere assertion. *Marnic Realty*, 1990-INA-48 (Nov. 21, 1990); *Quality Products of America, Inc.*, 1987-INA-703 (Jan. 31, 1989). In *St. Lolly International, Inc.*, 1988-INA-237 (Mar. 28, 1990), it was found that the employer unlawfully rejected a U.S. applicant where the applicant's resume reflected an apparently highly qualified candidate, the applicant stated great interest in the position, but the employer stated in its recruitment report that the applicant subsequently stated that he was not qualified for the position. The veracity of the employer's recruitment report was questioned, in that case, employer having failed to report the content of the telephone conversation or state why the candidate felt he was not qualified.

In the instant case, Employer has provided the alleged reasons why each of the candidates felt they were not qualified. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Where a fact lends itself to proof by independent documentation, the weight and sufficiency of a party's case is bolstered by such documentation. Where, as here, however, a fact is not capable of proof by independent documentation, the thing is provable only by the testimony or statements of the persons involved. The weight of statements not capable of support by independent documentation depend largely on the credibility of the person making the statement. The credibility of the speaker, in turn, depends on (1) the surrounding facts and circumstances; (2) the source of the knowledge of the speaker; (3) the interest of the speaker; (4) the good or bad intentions of the speaker; (5) the manner of testimony by the speaker; and (6) other indices of honesty or credibility. *Mr. and Mrs. Jeffrey Hines*, 1988-INA-510 (Apr. 9, 1990). The credibility of Employer's recruitment report is at issue herein, given the high number of applicants who applied for the job whose resumes indicated they were qualified, and yet who, upon being interviewed by Employer, asserted that they were unqualified for the position. Employer claims that these applicants stated they were not qualified to perform certain aspects of the position, as listed in the job description to which they responded. No independent documentation of the statements of these applicants has been provided. Employer seeks to have this Board rely solely on its assertions to that effect, as made in its recruitment report.

Taking into account the factors cited above, this Board does not find Employer's statements to this effect to be particularly credit-worthy. That thirteen of the nineteen applicants who applied, whose resumes indicated they were qualified, and who apparently believed they were qualified, as evidenced by the fact that they responded to the advertisement in the first place, subsequently stated in a telephone interview that they were not qualified, is questionable. The sole support for this claim is Employer's statements to that effect. Upon weighing these statements, Employer's bare assertions in this respect do not appear to be credible given (1) the surrounding facts and circumstances, and (2) Employer's interest and intentions, as evidenced by the tone and content of its interview letter and recruitment report. In sum, the evidence in this case does not support a finding that these applicants were lawfully rejected for the job opportunity. Labor certification was properly denied, and the following order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

Entered at the direction of the panel:

Todd R. Smyth, Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.